MOTION FILED

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No. 00-1260

In The
SUPREME COURT OF THE UNITED STATES

UNITED STATES,
Petitioner,

v.

MARK JAMES KNIGHTS,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF *AMICUS CURIAE* OF THE RUTHERFORD INSTITUTE IN SUPPORT OF RESPONDENT

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QUESTION FOR REVIEW SUGGESTED BY *AMICUS CURIAE*

Whether, in light of *Colonnade v. United States,* 397 U.S. 72 (1970) and *Griffin v. Wisconsin*, 483 U.S. 868 (1987), a condition of probation that a probationer submit to "a search any time of the day or night by any peace officer with or without a warrant," in the absence of legislative approval, is repugnant to the Fourth Amendment of the Constitution?

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

The Rutherford Institute hereby moves this Honorable Court for leave to file a brief *amicus curiæ* in support of the Respondent on the grounds that the brief is desirable in view of the significance of the issues raised by the Petitioner and by the State of California in support of a grant of certiorari, and to bring to the Court's attention important issues and legal facts not addressed by the parties and to clarify for the Court pursuant to Supreme Court Rule 15.2 California law and policy, all of which will be helpful to this court in resolving whether this case is appropriate for review at this time.

The Solicitor General of the United States has consented to the filing of this brief. Respondent's counsel has not consented.

The interest of the proposed *Amicus* in this case is fully set forth at page 1 of the Brief.

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

STATEMENT OF *AMICUS CURIAE* INTEREST AND INTRODUCTION[1]

The Rutherford Institute is an international, non-profit civil liberties organization headquartered in Charlottesville, Virginia. The Institute, founded in 1982 by its President, John W. Whitehead, educates and litigates on behalf of constitutional and civil liberties. Attorneys affiliated with the Institute have filed petitions for writ of certiorari in the United States Supreme Court in more than two dozen cases, and certiorari has been accepted in several significant constitutional cases. *See Frazee v. Dept. of Employment Sec.*, 489 U.S. 829 (1989); *Arkansas Educational Television Comm'n. v. Forbes*, 523 U.S. 666 (1998); and *Good News Club v. Milford Central School*, No. 99-2036 (October Term 2000). Institute attorneys have filed numerous *amicus curiae* briefs in the United States Supreme Court in cases involving the rights of the accused.[2] Institute attorneys currently handle several hundred cases nationally, including numerous Fourth Amendment cases. The

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1 *Amicus curiae* The Rutherford Institute files this brief upon leave of the Court. Counsel for The Rutherford Institute authored this brief in its entirety. No person or entity, other than the Institute, its supporters, or its counsel, made a monetary contribution to the preparation or submission of this brief.

2 *See, e.g., Wyoming v. Houghton*, 526 U.S. 295 (1999), *Slack v. McDaniel*, 529 U.S. 472 (2000), *Illinois v. Wardlow*, 528 U.S. 119 (2000); *Florida v. J.L.*, 529 U.S. 266 (2000); *Indianapolis v. Edmond*, 121 S.Ct. 447 (2000); *Ferguson v. City of Charleston*, Sup.Ct. No. 99-936 (March 21, 2001), and *Illinois v. McArthur*, 121 S.Ct. 946 (2001).

Institute has published educational materials and taught continuing legal education classes in this area as well.

The issue presented by this Petition, the degree to which a probationer can be searched "any time of the day or night by any peace officer," is a question of great concern, insofar as it touches upon how society deals with offenders and assures itself that the offender does in fact comply with conditions of probation while on a discretionary grant of probation. Because of the depth and breadth of its knowledge on this subject, the Rutherford Institute believes that its insights on this issue will be helpful to understand more accurately the legal environment in California with respect to that issue. Sup. Ct. Rule 15.2.

SUMMARY OF ARGUMENT

This court has consistently held that for a search to be valid, it must either comply with the Fourth Amendment or be legislatively, and expressly, authorized. Of the several states, District of Columbia and the territories of the United States, only three states, including California, permit search of a probationer any time of the day or night by any peace officer. Of a large number of state supreme courts that have considered the issue, all but three have rejected such a scheme as unconstitutional. The Ninth Circuit Court of Appeals' decision is therefore consistent with stare decisis from this Court and an overwhelming majority of state supreme courts. As California has not legislatively authorized search and seizure any time of the day or night by clear and unequivocal language, the court should decline review, or, in the alternative, grant certiorari, and summarily dispose of the case *per curiam* based on stare decisis.

ARGUMENT IN OPPOSITION TO CERTIORARI

I. THE NINTH CIRCUIT'S DECISION IS IN ACCORD WITH STARE DECISIS OF THIS COURT AND A MAJORITY OF THE STATE COURTS THAT HAVE CONSIDERED THE ISSUE

A. There Must Be A Clear, Express, Statutory Authorization For A Fourth Amendment Waiver To Be Effective

While statutory authorization of warrantless searches is not the *sine qua non* of a valid search, in the absence of an express statutory authorization, traditional Fourth Amendment rules must apply. *Colonnade Corp. v. United States*, 397 U.S. 72 (1970). In *Colonnade*, a case arising under 26 USC §§ 5301(c), 5146, and 7606 for possible violations of the Internal Revenue Code, the agents sought evidence of violations and demanded entry to inspect pursuant to a statutory authorization, which provided for sanctions on refusal to permit entry but did not expressly provide for a warrantless entry to search. The Court noted that "Congress has broad power to design such powers of inspection under the liquor laws as it deems necessary to meet the evils at hand." *Colonnade*, 397 U.S. at 76. It went on, however, to note "that administrative entry, without consent, upon the portions of the commercial premises not open to the public may only be compelled through prosecution or physical force within the framework of a warrant procedure...." *Id.* at 76-77. The Court concluded, "Where Congress has authorized inspection but made no rules governing the procedure that inspectors must follow, the Fourth Amendment and its various restrictive rules apply." *Id.* at 77; *cf. United States v. Biswell*, 482 U.S. 691 (1972) (express Congressional authorization; regulated industry). In *Payton v. New York*, 445 U.S. 573 (1980), the Court struck down a state statute that

permitted warrantless searches absent probable cause. *See also G.M. Leasing Corp. v. United States*, 429 U.S. 338 (1977) (warrantless entry and seizure of assets on company property unlawful); *See v. Seattle*, 387 U.S. 541 (1967) (warrantless administrative inspection in commercial building unlawful); *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920); *and cf. Illinois v. Krull*, 480 U.S. 340, 349-355 (1986) (statutory scheme for inspection of junk dealers held unconstitutional under state law) with *New York v. Burger* 482 U.S. 691, 699-703 (1987) (statutory inspection scheme of junk dealers upheld). Consequently, where no express legislative authorization exists that is reasonably related to the purposes of a probation program, traditional Fourth Amendment procedures must apply to avoid delegating unfettered discretion to peace officers.

All states make some provision for probation. Not all states are consistent with what conditions should be required, and some have not made any statutory provisions at all for conditions.[3]

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3 That there should be legislation, and uniformity in the legislation, is obvious in light of the states' various enactments of the Uniform Act for Out-Of-State Parolee Supervision. *See* United States Code and state statutory provisions cited in Appendix A. The Act does not provide for any particular conditions of probation, except as follows: "(2) That each receiving state will assume duties of visitation and of supervision over probationers or parolees of any sending state and in the exercise of those duties will be governed by the same standards that prevail for its own probationers and parolees." Cal. P.C., § 11177. This provides for discriminatory treatment. For example, a probationer from Illinois on supervision in California is subject to searches "any time of the day or night by any probation officer or peace officer" whereas a probationer from California on supervision in Illinois is subject to "visits by the

Insofar as Fourth Amendment search issues are concerned, the most common condition found is consistent with the Model Penal Code § 301.1(2)(j) "to report as directed to the Court or the probation officer and to permit the officer to visit his home; ...."See Appendix B, § 1. Many states adopting the (j) provision add "and elsewhere." See Appendix B, § 2. A few states provide, in one form or another for the MPC § 301.1(2)(l) "to satisfy any other conditions reasonably related to the rehabilitation of the defendant and not unduly restrictive of his liberty or incompatible with his freedom of conscience." Appendix B, § 3. Only two states, Illinois and North Carolina, have a detailed procedure for warrantless searches by a probation officer. Appendix B, § 4.

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probation officer at the probationer's home or place of work at reasonable times." Twenty-seven jurisdictions have express statutory provisions for either visits, searches, or both, limited to the probation officer; one permits the probation officer to use peace officers; none permit a peace officer to conduct searches. Twenty-seven jurisdictions have no express statutory provision for visits or searches by anyone; of these, one, New Mexico, by administrative regulation, prohibits a probation officer from conducting searches, requiring the officer to pursue normal search procedures, but by case law allows a probation officer to conduct searches. Courts in sixteen of the fifty-four jurisdictions surveyed have considered the issue. Two, Arkansas and Georgia, give greater latitude than expressly permitted by statute. In the Arkansas case, on state grounds, the scope of the statute limiting searches to probation offers was not discussed; the discussion centered only on federal grounds and the 4th Amendment, pursuant to *Griffin*. Eight found that the conditions imposed were rationally related to a legitimate purpose of rehabilitating the probationer. Only five were faced with a state statute which had no express provisions for visits or searches and of those five, only California permits "blanket searches." *See* following discussion and Appendices A and B.

Many states expressly provide for drug testing. Appendix B, § 5. No state, by statute, expressly permits a warrantless search by peace officers. *See generally* Appendix B.

A requirement that the several states by legislation authorize in the first instance the waiver of Fourth Amendment rights, with necessary safeguards, is essential in view of the importance of this issue, in order to give clear notice to those who must administer the program and those who must abide by the terms, provide clear guidance to probationers on their duties and responsibilities, provide for uniform treatment of probationers who are subject to relocation and transfer, and to assure that appropriate consideration is given to third parties and potential bystanders whose rights should not be impaired by unreasonable conditions of probation and parole.

B. This Court Held in *Griffin* that a State Does Have an Interest in Close Supervision of Those *In Custodia Legis*

Regardless of the applicable standard, a probationer's, or parolee's home, like everyone else's, is protected by the Fourth Amendment's requirement that searches be "reasonable." *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987) (probationer).[4] Supervision is a special need of the state permitting a degree of impingement upon privacy that would not be constitutional if applied to the public at large, but the permissible degree is not unlimited. 483 U.S. at 875. The "special needs" of a probation system make the warrant system impracticable and justify the replacement of the

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4 The court did not reach the question as to when a police officer could search. In *Griffin*, the police officer reported he thought that the probationer had a gun, but it was the probation officer, not the police, who conducted the search.

standard of probable cause by "reasonable ground." 483 U.S. at 875-76.

In most jurisdictions, the result reached in *Griffin v. Wisconsin* had been a foregone conclusion, with other courts having moved in the direction of requiring at a minimum that a peace officer at least have consulted with a probation officer.[5]

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5 *E.g.*, *State v. Cullison*, 173 N.W.2d 533 (Iowa 1970) (parolee; unreasonable search); *People v. Way*, 319 N.Y.S.2d 16 (New York 1971)(parolee; limited scope); *People v. Peterson*, 233 N.W.2d 250, 254-55 (Mich. 1975) (blanket searches by peace officers unlawful); *Temez v. State*, 534 S.W.2d 686 (Tex. 1976); *State v. McGivney*, 585 P.2d 767 (Ore 1978); *State v. Holm*, 579 P.2d 860 (Ore. 1978) (probation Officer; "any peace officer" too broad); *Dearth v. State*, 390 So.2d 108 (Fla. App., 1980) (conditions of probation; fact that probationer agreed to "unfettered discretion" does not make void condition voluntary); *State v. Fogarty*, 610 P.2d 140 (Mont. 1980) (probation; search condition unconstitutional); *State v. Fields*, 686 P.2d 1379, 1389 (Haw. 1984)(probation; probable cause required); *Commonwealth v. La France*, 525 N.E.2d 379 (Mass. 1988) (search by probation officer); *People v. Hellenthal*, 465 N.W.2d 329 (Mich. 1990); *State v. Gallagher*, 675 P.2d 429 (NM. 1984); *State v. Cumming*, 262 N.W.2d 56 (S.D. 1978) (probation officer consent required); *State v. Gardner*, 619 P.2d 847 (N.M. 1980) (state statute silent; administrative code required probation officer to seek search warrant, but actual condition imposed provided that probation officer could conduct search; search led by probation officer valid); *State v. Perbix*, 331 N.W.2d 14 (ND. 1983) (search consistent with statutes permitting probation officer to search) [see now N.D.C.C. 15A-1343 adopting MPC (j)]. *But see People v. Bravo*, 43 Cal.3d 600 (1987); *Wilson v. State*, 752 S.W.2d 46 (Ark. 1988) [see now A.C.A. § 5-4-303 adopting MPC (j)]; *Allen v. State*, 369 S.E.2d 909 (Ga. 1988) [see now O.C.G.A. § 45-

It would appear that California is the first state ever to expressly authorize "blanket searches" of probationers without a warrant by any peace officer. *People v. Bravo*, 43 Cal.3d 600 (1987). *Bravo*, however, was decided only several days after *Griffin*, and cites *Griffin* only once. 43 Cal.3d at 608. *Bravo* conflicts with *Griffin* in that California has no state detailed regulation of probation, unlike Wisconsin, which authorized a departure from Fourth Amendment warrants. In *Griffin*, there was an objective standard, approved by the Court, which had to be met over and above being a mere parolee, and there were detailed regulations covering the subject.

The Oregon experience is illuminating. The Supreme Court noted that while the courts had the power to impose conditions of probation, and that while a "search and seizure" condition may be appropriate, there was no express legislative authority, such conditions could not be unlimited, that the courts were not the means of defining that limit in the first instance, but did so reluctantly. Evidently the Oregon legislature took the hint because it appears to have enacted legislation permitting a "search and seizure" condition "by the probation officer, or any peace officer assisting the probation officer." *See State v. Hovater*, 588 P.2d 56 (1978); *State v. Davis*, 597 P.2d 1280 (1979).

8-35 adopting MPC (j)]; *State v. Finnegan*, 439 N.W.2d 496 (Neb. 1989) (search "by any peace officer" limited to part of drug rehabilitation program only); *People v. Hellenthal*, 465 N.W.2d 329 (Mich. 1990) (drug search as part of drug rehabilitation program approved). *See generally*, Annotation, *Validity of Requirement that, As Condition of Probation, Defendant Submit to Warrantless Searches*, 79 A.L.R. 3d 1083; Annotation, *Validity, Under Fourth Amendment, of Warrantless Search of Parolee or His Property by Parole Officer*, 32 A.L.R. Fed 155.

The great weight of authority thus holds that neither a parolee nor a probationer may be abused during authorized searches. Given the purpose of probation and parole, the fact that the probation and parole officers know their own charges better than anyone else, and certainly more than a magistrate knows about unknown citizens when issuing a search warrant, the Fourth Amendment requires at a minimum that peace officers contact the parole or probation officer for permission to conduct a search of the parolee or probationer, and no search unless so authorized is valid, absent exigent circumstances, because the administration of conditions of parole and probation are a non-delegable duty necessary to rehabilitate the offender, yet prevent the exploitation of such persons and the abuse of those not on probation. This result is consistent with, and required by, this Court' enunciated rule of law which forbids the granting of "unfettered discretion" to peace officers in the area of law enforcement. *E.g.*, *Florida v. Wells*, 95 U.S. 1 (1990) inventory of containers where no state policy authorizes inventory); *Payton v. New York*, 45 U.S. 573 (1980); Rotunda, CONSTITUTIONAL TREATISE, §§ 20.9, p. 34. It is for the courts to supervise probationers, through the probation office, and not for peace officers, and such a delegation is simply not permitted.

C. California Has No Detailed Rules and Regulations for the Imposition of a Statutory Waiver of The Fourth Amendment

California's legislature has not clearly and unequivocally authorized a condition of probation searches "by any peace officer at any time of the day or night with or without a warrant." P.C., §§

1192.3[6], 1202.7[7], 1202.8[8], 1203[9], 1203.016[10], 1203.1[11],

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6 (a) A plea of guilty or nolo contendere to an accusatory pleading charging a public offense, other than a felony specified in Section 1192.5 or 1192.7, which public offense did not result in damage for which restitution may be ordered, made on the condition that charges be dismissed for one or more public offenses arising from the same or related course of conduct by the defendant which did result in damage for which restitution may be ordered, may specify the payment of restitution by the defendant as a condition of the plea or any probation granted pursuant thereto, so long as the plea is freely and voluntarily made, there is factual basis for the plea, and the plea **and all conditions are approved by the court**....

7 The Legislature finds and declares that the provision of probation services is an essential element in the administration of criminal justice. The safety of the public, which shall be a primary goal through the enforcement of court-ordered conditions of probation; the nature of the offense; the interests of justice, including punishment, reintegration of the offender into the community, and enforcement of conditions of probation; the loss to the victim; and the needs of the defendant shall be the primary considerations in the granting of probation.

8 1202.8. (a) Persons placed on probation by a court shall be under the supervision of the county probation officer who shall determine both the level and type of supervision consistent with the court-ordered conditions of probation. (b) Within 30 days of a court making an order to provide restitution to a victim or to the Restitution Fund, the probation officer shall establish an account into which any restitution payments that are not deposited into the Restitution Fund shall be deposited.

9 1203. (a) As used in this code, "probation" means the suspension of the imposition or execution of a sentence and the order

1210.1[12], 1203.4 (emphases supplied).

There is no basis for the Attorney General's reliance on

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of conditional and revocable release in the community under the supervision of a probation officer. As used in this code, "conditional sentence" means the suspension of the imposition or execution of a sentence and the order of revocable release in the community subject to conditions established by the court without the supervision of a probation officer. It is the intent of the Legislature that both conditional sentence and probation are authorized whenever probation is authorized in any code as a sentencing option for infractions or misdemeanors.

10 See Appendix at C7. Note that this section, involving home detention, permits inspection of hte home. Subdivision (b)(2).

11 See Appendix at C1.

12 1210.1. Possession of Controlled Substances; Probation; exceptions. (a) Notwithstanding any other provision of law, and except as provided in subdivision (b), any person convicted of a nonviolent drug possession offense shall receive probation. As a condition of probation the court shall require participation in and completion of an appropriate drug treatment program. The court may also impose, as a condition of probation, participation in vocational training, family counseling, literacy training and/or community service. A court may not impose incarceration as an additional condition of probation. Aside from the limitations imposed in this subdivision, **the trial court is not otherwise limited in the type of probation conditions it may impose**.

It is interesting that even in drug cases, the legislature has failed to provide explicitly for a statutory waiver of the 4th amendment.

section 1203.1. It is a general grant of authority to administer probation. Unlike 1203.016 and 1203.10, it contains no hint of allowing inspections, let alone searches. Thus, the California courts, in the complete absence of legislative authority, have created a Fourth Amendment waiver, without any apparent safeguards as set forth by this Court in *Griffin*, *supra*. This court's decision in *Colonnade, supra*, is directly on point: absent legislative approval in the first instance, the regulation is void for lack of authority. Moreover, as discussed above, an overwhelming number of state supreme courts agree that such a provision is unlawful.

CONCLUSION

WHEREFORE, for the reasons set forth above, the Court's *amicus* respectfully submits that this Court should deny the Petition for Writ of Certiorari, or grant and summarily affirm the decision of the Ninth Ciruit Court of Appeals *per curiam*. *E.g.*, *Ohio v. Reiner*, S.Ct. No. 00-1028 (3/19/01) *(per curiam)*.

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Dated: April 4, 2001

APPENDIX A

4 U.S.C. § 112 (2001)

Ala. Code 1975 § 15-22-1

Alaska Stat. §§ 33.36.110, 33.36.120

Ariz. R.S. §§ 31-461 to 31-465

Ark. C.A. §§ 16-93-901 to 16-93-903

Cal. Pen. C. §§ 11175 to 11179

Colo. R.S.A. §§ 24-60-301 to 24-60-309

Conn. G.S.A. §§ 54-132 to 54-138

Del. Code 11 §§ 4358, 4359

D.C. Code 1981, §§ 24-251 to 24-253

Fla. S.A. §§ 949.07 to 949.07

Ga. Official Code §§ 49-2-70, 49-2-71

Hawaii R.S. §§ 353-81, 353-82

Idaho Code §§ 20-301, 20-302

Ill. S.H.A. 730 ILCS 5/3-3-11

Ind. A.C. §§ 11-13-4-1, 11-13-4-2

Iowa C.A. § 907A.1

Kan. S.A. § 22-4101, et seq.

Ky. RS § 439.560

La. SA-R.S. § 15:574.14

Me. 34-A.R.S.A.§§ 9801, et seq.

Md. Code 1957, art. 41, §§ 4-801 to 4-803

Mass. G.L.A. c. 127, §§ 151A to 151G

Mich. C.L.A. §§ 798.101 to 798.103

Minn. S.A. § 243.16

Miss. Code 1972 § 47-7-71

Mo. V.A.M.S. § 217.810

Mont. C.A. §§ 46-23-1101 to 46-23-1106

Neb. R.R.S. 1943, §§ 29-2637 to 29-2638

Nev. R.S. §§ 213.180 to 213.210

N.H. RSA § 651-A:25

N.J.S.A. §§ 2A:168-14 to 2A:168-17

N.M.S.A. 1978 §§ 31-5-1 to 31-5-2

N.Y. Executive Law § 259-m

N.C.G.S. §§ 148-65.1 to 148-65.2

N.D.C.C. §§ 12-56-01, 12-56-02

Ohio R.C. §§ 5149.17 to 5149.23

57 Okl. St. Ann. §§ 347 to 349

Ore. RS §§ 144.610 to 144.620

Penn. Stat. 61 §§ 321, 322;

Puerto Rico 4 L.P.R.A. §§ 637 to 639

R.I Gen. Laws 1956, §§ 13-9-1 to 13-9-2

S.C. Code 1976, §§ 24-21-810 to 24-21-830

S.D.C.L. §§ 24-16-1 to 24-16-5

Tenn. C.A. § 40-28-401

Tex. Ann. C.C.P. art. § 42.11

Utah C.A. 1953, §§ 77-27-24 to 77-27-31

Vt. Stat. Ann. 28 § 1301

Virgin Islands Code 5 §§ 4631 to 4633

Va. Code 1950, §§ 53.1-166, 53.1-167

Wash. Rev. Code § 9.95.270

W.Va. Code, 28-6-1, 28-6-2

Wis. S.A. 304.13

Wyo. S.1977, §§ 7-13-412 to 7-13-417.

APPENDIX B

Section 1: Jurisdictions incorporating Model Penal Code § 301.1(2)(j), requiring probationers "to report as directed to the Court or the probation officer and to permit the officer to visit his home; ....":

Ark Code Ann. § 5-4-303

Ga. O.C.G.A. § 45-8-35

Ind. A.I.C. 35-38-2-2.3

Kan. S.A. 21-4610

Ky. RS 533.030

La R.S. 15:574.4

Me. R.S.A. § 1204

Neb. R.R.S. 1993, § 29-2262

N.J.S.A. 2C:45-1

N.Y Penal Law § 65.10

Pa. Stat. 4 § 9754

Section 2: Jurisdictions incorporating Model Penal Code § 301.1(2)(j) and adding "and elsewhere:"

18 USC, § 3563

Colo. R.S.A. § 16-11-204(i)

Fla. S.A. § 948.03

Hawaii RS § 706-624

Ill. CS 5/3-6-3 S.H.A. 730

Miss. Code 1972, § 47-7-35

N.D.C.C. § 12.1-32-07 [limited to reasonable times]

Ore. RS § 137.540

Vt. Stat. 28 § 252 [limited to reasonable times]

Section 3: Jurisdictions incorporating Model Penal Code § 301.1(2)(l), requiring probationers "to satisfy any other conditions reasonably related to the rehabilitation of the defendant and not unduly restrictive of his liberty or incompatible with his freedom of conscience:"

18 USC, § 3563

Ark Code Ann. § 5-4-303

Hawaii RS § 706-624

Ill. CS 5/3-6-3 S.H.A. 730

N.J.S.A. 2C:45-1

Pa. Stat. 4 § 9754

Section 4: Jurisdictions with detailed procedures for warrantless searches by a probation officer:

Ill. CS 5/3-6-3 S.H.A. 730

N.C.G.S. § 15A-1343

Section 5: Jurisdictions which expressly provide for drug testing:

18 USC, § 3563

18 USC, § 3563

Ariz. R.S. §13-914

Fla. S.A. § 948.03

Hawaii RS § 706-624

Ill. CS 5/3-6-3 S.H.A. 730

Ind. A.I.C. 35-38-2-2.3

Me. R.S.A. § 1204

Miss. Code 1972, § 47-7-35

Neb. R.R.S. 1993, § 29-2262

Nev. .R.S. 176.185 to 176.227

N.D.C.C. § 12.1-32-07

Ore. RS § 137.540

Puerto Rico Law 34 § 1027a

Tex. Ann. C.Cr.P. art. 42.12, § 11

Section 6: Jurisdictions silent on the issues of consent to search:

Ala. Code 1975, § 15-22-29

Alaska Stat. § 12.55.100

Ariz. R.S. §§ 12-299, et seq.

Cal. Pen. C. §§ 11175 to 11179

Conn. G.S.A. § 53a-30

Del. Code 11 § 4332

D.C. Code 1981, §§ 24-101 to 24-106

Idaho C. §§ 19-2601 to 19-2607

Iowa C.A. § 907.6

Md. Code 1957, art. 27, § 641, 641A

Mass. G.L.A. c. 276, § 387, 387A

Mich. C.L.A. § 771.3

Minn. S.A. § 609.135

Mo. V.A.M.S. § 217.705

Mont. CA §§ 46-1-202, 46-18-201, 46-23-1001

N.H. RSA 651:2

N.M.S.A. 1978, § 31-21-21

Ohio R.C. § 2951.02

Okl. St.Ann. 22 § 991a

R.I. Gen. Laws 1956, §§ 12-19-8, 21-28-4.21

S.C. Code 1976 § 24-21-430

S.D.C.L. § 23A-27-18

Tenn.C.A. § 40-35-303

Utah. Code 1953 § 77-18-1

Virgin Islands Code 5 § 3711

Va. Code 1950, § 19.2-303

Wash. Rev. Code § 9-95-210

W.Va. Code § 62-12-9

Wis. S.A. § 973.09

Wyo. Stat.1977 § 7-13-30

APPENDIX C

1203.1. (a) The court, or judge thereof, in the order granting probation, may suspend the imposing or the execution of the sentence and may direct that the suspension may continue for a period of time not exceeding the maximum possible term of the sentence, except as hereinafter set forth, and upon those terms and conditions as it shall determine. The court, or judge thereof, in the order granting probation and as a condition thereof, may imprison the defendant in a county jail for a period not exceeding the maximum time fixed by law in the case. However, where the maximum possible term of the sentence is five years or less, then the period of suspension of imposition or execution of sentence may, in the discretion of the court, continue for not over five years. The following shall apply to this subdivision:

(1) The court may fine the defendant in a sum not to exceed the maximum fine provided by law in the case.

(2) The court may, in connection with granting probation, impose either imprisonment in a county jail or a fine, both, or neither.

(3) The court shall provide for restitution in proper cases. The restitution order shall be fully enforceable as a civil judgment forthwith and in accordance with Section 1202.4 of the Penal Code.

(4) The court may require bonds for the faithful observance and performance of any or all of the conditions of probation.

(b) The court shall consider whether the defendant as a condition of probation shall make restitution to the victim or the Restitution Fund. Any restitution payment received by a probation department in the form of cash or money order shall be forwarded to the victim within 30 d ys from the date the payment is received by the department. Any restitution payment received by a probation department in the form of a check or draft shall be forwarded to the victim within 45 days from the date the payment is received by the department, provided, that payment need not be forwarded to a victim until 180 days from the date the first payment is received, if the restitution payments for that victim received by the probation department total less than fifty dollars ($50). In cases where the court has ordered the defendant to pay restitution to multiple victims and where the administrative cost of disbursing restitution payments to multiple victims involves a significant cost, any restitution payment received by a probation department shall be forwarded to multiple victims when it is cost-effective to do so, but in no event shall restitution disbursements be delayed beyond 180 days from the date the payment is received by the probation department.

(c) In counties or cities and counties where road camps, farms, or other public work is available the court may place the probationer in the road camp, farm, or other public work instead of in jail. In this case, Section 25359 of the Government Code shall apply to probation and the court shall have the same power to require adult probationers to work, as prisoners confined in the county jail are required to work, at public work. Each county board of supervisors may fix the scale of compensation of the adult probationers in that county.

(d) In all cases of probation the court may require as a condition of probation that the probationer go to work and earn money for

the support of his or her dependents or to pay any fine imposed or reparation condition, to keep an account of his or her earnings, to report them to the probation officer and apply those earnings as directed by the court.

(e) The court shall also consider whether the defendant as a condition of probation shall make restitution to a public agency for the costs of an emergency response pursuant to Article 8 (commencing with Section 53150) of Chapter 1 of Part 1 of Division 2 of the Government Code.

(f) In all felony cases in which, as a condition of probation, a judge of the superior court sitting by authority of law elsewhere than at the county seat requires a convicted person to serve his or her sentence at intermittent periods the sentence may be served on the order of the judge at the city jail nearest to the place at which the court is sitting, and the cost of his or her maintenance shall be a county charge.

(g) (1) The court and prosecuting attorney shall consider whether any defendant who has been convicted of a nonviolent or nonserious offense and ordered to participate in community service as a condition of probation shall be required to engage in the removal of graffiti in the performance of the community service. For the purpose of this subdivision, a nonserious offense shall not include the following:

(A) Offenses in violation of the Dangerous Weapons Control Law (Chapter 1 (commencing with Section 12000) of Title 2 of Part 4).

(B) Offenses involving the use of a dangerous or deadly

weapon, including all violations of Section 417.

(C) Offenses involving the use or attempted use of violence against the person of another or involving injury to a victim.

(D) Offenses involving annoying or molesting children.

(2) Notwithstanding subparagraph (A) of paragraph (1), any person who violates Section 12101 shall be ordered to perform not less than 100 hours and not more than 500 hours of community service as a condition of probation.

(3) The court and the prosecuting attorney need not consider a defendant pursuant to paragraph (1) if the following circumstances exist:

(A) The defendant was convicted of any offense set forth in subdivision (c) of Section 667.5 or subdivision (c) of Section 1192.7.

(B) The judge believes that the public safety may be endangered if the person is ordered to do community service or the judge believes that the facts or circumstances or facts and circumstances call for imposition of a more substantial penalty.

(h) The probation officer or his or her designated representative shall consider whether any defendant who has been convicted of a nonviolent and nonserious offense and ordered to participate in community service as a condition of probation shall be required to engage in the performance of house repairs or yard services for senior citizens and the performance of repairs to senior centers

through contact with local senior service organizations in the performance of the community service.

(i) (1) Upon conviction of any offense involving child abuse or neglect, the court may require, in addition to any or all of the above-mentioned terms of imprisonment, fine, and other reasonable conditions, that the defendant shall participate in counseling or education programs, or both, including, but not limited to, parent education or parenting programs operated by community colleges, school districts, other public agencies, or private agencies.

(2) Upon conviction of any sex offense subjecting the defendant to the registration requirements of Section 290, the court may order as a condition of probation, at the request of the victim or in the court's discretion, that the defendant stay away from the victim and the victim's residence or place of employment, and that the defendant have no contact with the victim in person, by telephone or electronic means, or by mail.

(j) The court may impose and require any or all of the above-mentioned terms of imprisonment, fine, and conditions, and other reasonable conditions, as it may determine are fitting and proper to the end that justice may be done, that amends may be made to society for the breach of the law, for any injury done to any person resulting from that breach, and generally and specifically for the reformation and rehabilitation of the probationer, and that should the probationer violate any of the terms or conditions imposed by the court in the matter, it shall have authority to modify and change any and all the terms and conditions and to reimprison the probationer in the county jail within the limitations of the penalty of

the public offense involved. Upon the defendant being released from the county jail under the terms of probation as originally granted or any modification subsequently made, and in all cases where confinement in a county jail has not been a condition of the grant of probation, the court shall place the defendant or probationer in and under the charge of the probation officer of the court, for the period or term fixed for probation. However, upon the payment of any fine imposed and the fulfillment of all conditions of probation, probation shall cease at the end of the term of probation, or sooner, in the event of modification. In counties and cities and counties in which there are facilities for taking fingerprints, those of each probationer shall be taken and a record of them kept and preserved.

(k) Notwithstanding any other provisions of law to the contrary, except as provided in Section 13967, as operative on or before September 28, 1994, of the Government Code and Section 13967.5 of the Government Code and Sections 1202.4, 1463.16, paragraph (1) of subdivision (a) of Section 1463.18, and Section 1464, and Section 1203.04, as operative on or before August 2, 1995, all fines collected by a county probation officer in any of the courts of this state, as a condition of the granting of probation or as a part of the terms of probation, shall be paid into the county treasury and placed in the general fund for the use and benefit of the county.

(l) If the court orders restitution to be made to the victim, the board of supervisors may add a fee to cover the actual administrative cost of collecting restitution but not to exceed 10 percent of the total amount ordered to be paid. The fees shall be paid into the general fund of the county treasury for the use and benefit of the county.

1203.016. (a) Notwithstanding any other provision of law, the board of supervisors of any county may authorize the correctional administrator, as defined in subdivision (h), to offer a program under which minimum security inmates and low-risk offenders committed to a county jail or other county correctional facility or granted probation, or inmates participating in a work furlough program, may voluntarily participate in a home detention program during their sentence in lieu of confinement in the county jail or other county correctional facility or program under the auspices of the probation officer.

(b) The board of supervisors may prescribe reasonable rules and regulations under which a **home detention program** may operate. As a condition of participation in the home detention program, the inmate shall give his or her consent in writing to participate in the home detention program and shall in writing agree to comply with the rules and regulations of the program, including, but not limited to, the following rules:

(1) The participant shall remain within the interior premises of his or her residence during the hours designated by the correctional administrator.

(2) The participant shall admit any person or agent designated by the correctional administrator into his or her residence at any time for purposes of verifying the participant's compliance with the conditions of his or her detention.

(3) The participant shall agree to the use of electronic monitoring or supervising devices for the purpose of helping to verify his or her compliance with the rules and

regulations of the home detention program. The devices shall not be used to eavesdrop or record any conversation, except a conversation between the participant and the person supervising the participant which is to be used solely for the purposes of voice identification.

(4) The participant shall agree that the correctional administrator in charge of the county correctional facility from which the participant was released may, without further order of the court, immediately retake the person into custody to serve the balance of his or her sentence if the electronic monitoring or supervising devices are unable for any reason to properly perform their function at the designated place of home detention, if the person fails to remain within the place of home detention as stipulated in the agreement, if the person willfully fails to pay fees to the provider of electronic home detention services, as stipulated in the agreement, subsequent to the written notification of the participant that the payment has not been received and that return to custody may result, or if the person for any other reason no longer meets the established criteria under this section. A copy of the agreement shall be delivered to the participant and a copy retained by the correctional administrator.

(c) Whenever the peace officer supervising a participant has reasonable cause to believe that the participant is not complying with the rules or conditions of the program, or that the electronic monitoring devices are unable to function properly in the designated place of confinement, **the peace officer may, under general or specific authorization of the correctional administrator, and without a warrant of arrest, retake the person into custody to**

complete the remainder of the original sentence.

(d) Nothing in this section shall be construed to require the correctional administrator to allow a person to participate in this program if it appears from the record that the person has not satisfactorily complied with reasonable rules and regulations while in custody. A person shall be eligible for participation in a home detention program only if the correctional administrator concludes that the person meets the criteria for release established under this section and that the person's participation is consistent with any reasonable rules and regulations prescribed by the board of supervisors or the administrative policy of the correctional administrator.

(1) The rules and regulations and administrative policy of the program shall be written and reviewed on an annual basis by the county board of supervisors and the correctional administrator. The rules and regulations shall be given to or made available to any participant upon request.

(2) The correctional administrator, or his or her designee, shall have the sole discretionary authority to permit program participation as an alternative to physical custody. All persons referred or recommended by the court to participate in the home detention program pursuant to subdivision (e) who are denied participation or all persons removed from program participation shall be notified in writing of the specific reasons for the denial or removal. The notice of denial or removal shall include the participant's appeal rights, as established by program administrative policy.

(e) The court may recommend or refer a person to the correctional administrator for consideration for placement in the home detention program. The recommendation or referral of the court shall be given great weight in the determination of acceptance or denial. At the time of sentencing or at any time that the court deems it necessary, the court may restrict or deny the defendant's participation in a home detention program.

(f) The correctional administrator may permit home detention program participants to seek and retain employment in the community, attend psychological counseling sessions or educational or vocational training classes, or seek medical and dental assistance. Willful failure of the program participant to return to the place of home detention not later than the expiration of any period of time during which he or she is authorized to be away from the place of home detention pursuant to this section and unauthorized departures from the place of home detention are punishable as provided in Section 4532.

(g) The board of supervisors may prescribe a program administrative fee to be paid by each home detention participant that shall be determined according to his or her ability to pay. Inability to pay all or a portion of the program fees shall not preclude participation in the program, and eligibility shall not be enhanced by reason of ability to pay. All program administration and supervision fees shall be administered in compliance with Section 1208.2.

(h) As used in this section, the following words have the following meanings:

(1) "Correctional administrator" means the sheriff,

probation officer, or director of the county department of corrections.

(2) "Minimum security inmate" means an inmate who, by established local classification criteria, would be eligible for placement in a Type IV local detention facility, as described in Title 15 of the California Code of Regulations, or for placement into the community for work or school activities, or who is determined to be a minimum security risk under a classification plan developed pursuant to Section 1050 of Title 15 of the California Code of Regulations.

(3) "Low-risk offender" means a probationer, as defined by the National Institute of Corrections model probation system.

(i) Notwithstanding any other law, the police department of a city where an office is located to which persons on an electronic monitoring program report may require the county correctional administrator to provide information concerning those persons. This information shall be limited to the name, address, date of birth, and offense committed by the home detainee. Any information received by a police department pursuant to this paragraph shall be used only for the purpose of monitoring the impact of home detention programs on the community.

(j) It is the intent of the Legislature that home detention programs established under this section maintain the highest public confidence, credibility, and public safety. In the furtherance of these standards, the following shall apply:

(1) The correctional administrator, with the approval of the board of supervisors, may administer a home detention program pursuant to written contracts with appropriate public or private agencies or entities to provide specified program services. No public or private agency or entity may operate a home detention program in any county without a written contract with that county's correctional administrator. However, this does not apply to the use of electronic monitoring by the California Department of Corrections or the Department of the Youth Authority as established in Section 3004. No public or private agency or entity entering into a contract may itself employ any person who is in the home detention program.

(2) Program acceptance shall not circumvent the normal booking process for sentenced offenders. All home detention program participants shall be supervised.

(3) (A) All privately operated home detention programs shall be under the jurisdiction of, and subject to the terms and conditions of the contract entered into with, the correctional administrator.

(B) Each contract shall include, but not be limited to, all of the following:

(i) A provision whereby the private agency or entity agrees to operate in compliance with any available standards promulgated by state correctional agencies and bodies, including the Board of Corrections, and all statutory provisions and mandates, state and county, as appropriate

and applicable to the operation of home detention programs and the supervision of sentenced offenders in a home detention program.

(ii) A provision that clearly defines areas of respective responsibility and liability of the county and the private agency or entity.

(iii) A provision that requires the private agency or entity to demonstrate evidence of financial responsibility, submitted and approved by the board of supervisors, in amounts and under conditions sufficient to fully indemnify the county for reasonably foreseeable public liability, including legal defense costs, that may arise from, or be proximately caused by, acts or omissions of the contractor. The contract shall provide for annual review by the correctional administrator to ensure compliance with requirements set by the board of supervisors and for adjustment of the financial responsibility requirements if warranted by caseload changes or other factors.

(iv) A provision that requires the private agency or entity to provide evidence of financial responsibility, such as certificates of insurance or copies of insurance policies, prior to commencing any operations pursuant to the contract or at any time requested by the board of supervisors or correctional administrator.

(v) A provision that permits the correctional

administrator to immediately terminate the contract with a private agency or entity at any time that the contractor fails to demonstrate evidence of financial responsibility.

(C) All privately operated home detention programs shall comply with all appropriate, applicable ordinances and regulations specified in subdivision (a) of Section 1208.

(D) The board of supervisors, the correctional administrator, and the designee of the correctional administrator shall comply with Section 1090 of the Government Code in the consideration, making, and execution of contracts pursuant to this section.

(E) The failure of the private agency or entity to comply with statutory provisions and requirements or with the standards established by the contract and with the correctional administrator may be sufficient cause to terminate the contract.

(F) Upon the discovery that a private agency or entity with whom there is a contract is not in compliance pursuant to this paragraph, the correctional administrator shall give 60 days' notice to the director of the private agency or entity that the contract may be canceled if the specified deficiencies are not corrected.

(G) Shorter notice may be given or the contract may be canceled without notice whenever a serious threat to public safety is present because the private agency or entity has failed to comply with this section.

(k) For purposes of this section, "evidence of financial responsibility" may include, but is not limited to, certified copies of any of the following:

(1) A current liability insurance policy.
(2) A current errors and omissions insurance policy.
(3) A surety bond.